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In the Supreme Court
of the United States

OCTOBER TERM 1965

NO. 710

CONTINENTAL GRAIN COMPANY,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, Continental Grain Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled case on July 7, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court of the State of Washington (R. 92-101), is unreported and is printed in App. B hereto, infra p. 39. The opinion of the Supreme Court of the State of Washington (R. 235-240) printed in App. B hereto, infra p. 24, is reported in 66 Wn. 2d 183, 401 P2d 870.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was filed May 6 (R. 235) App. B. infra p. 24. Petition for rehearing was denied July 7, 1965 (R. 234) and judgment became final on that date. An order extending time within which to file a petition for a writ of certiorari to November 5, 1965 was signed by Justice Douglas of this Court on October 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the State of Washington tax for the privilege of engaging in business within the state upon Continental Grain Company's gross revenues attributable to charges for unloading carriers which deliver grain from outside of the State of Washington to its tidewater terminal is invalid as in violation of the Commerce Clause, Article I, § 8, Clause 3 of the Constitution of the United States.

2. The Washington gross receipts tax statute permits a deduction from gross income of amounts derived from transportation of commodities to an export elevator on tidewater from points of origin in the State of Washington. The Washington Supreme Court holds in this case that such a deduction is not allowed with respect to unloading charges on grain received from points of origin outside of the state. Does the Washington law as so interpreted discriminate against interstate commerce

so as to invalidate a tax levied on amounts derived from such unloading charges under the Commerce Clause, Article I, § 8, Clause 3 of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

(a) U. S. Constitution:
Art I, § 8, cl 3, the Commerce Clause (referred to hereinafter as the "Commerce Clause")

(b) Washington Statutes:
RCW 82.16.010 (11) and (12)
RCW 82.16.020 (5)
RCW 82.16.026
RCW 82.16.050 (8)

They are printed in Appendix A, infra, pp. 21-23.

STATEMENT

1. Procedural History.

The Tax Commission of the State of Washington on February 23, 1961, assessed Continental Grain Company with taxes covering the years 1957 through 1960 under Chapter 82.16 RCW (Public Utility Tax). Continental Grain Company petitioned the State Tax Commission for hearing and correction of the above assessment. By Order No. 62-4, dated March 6, 1962 (R. 112-116), the State Tax Commission denied the petition, but provided for deletion of any amounts included for tax purposes,

which were attributable to petitioner's activities in loading out from its terminal elevator into export ships.

Thereafter, petitioner filed its notice of appeal from the determination of the State Tax Commission to the Superior Court of the State of Washington for Thurston County. The trial was held on a stipulation of facts (R. 104-110) and with additional testimony received. At the trial, petitioner contended that the tax on Continental Grain Company's activities in unloading cars, vehicles and barges which originate outside the State of Washington was in violation of the Commerce Clause. The Superior Court held (R. 92-101) App. B, infra p. 30, that the tax was not in violation of the Export Clause of the Constitution, Art. 1, § 10; that Continental Grain Company was taxable under RCW Ch. 82.04 at the rate of 1% rather than RCW Ch. 82.16 at the rate of 1.8%; and that the tax on Continental Grain Company's activities in unloading the grain originating at points outside the State of Washington was not in violation of the Commerce Clause. The findings of fact and conclusions of law and the judgment based thereon were filed December 31, 1963 (R. 225-229).

The Tax Commission of the State of Washington appealed to the Supreme Court of the State of Washington from that portion of the decision of the Superior Court which held Continental Grain Company taxable under RCW 82.04 rather than RCW 82.16. Continental Grain Company cross-appealed from that portion of the judgment which held that the tax based on unloading grain originating from outside the State of

Washington was not prohibited by the Commerce Clause. On May 6, 1965 the Supreme Court of the State of Washington filed its opinion reversing the decision of the Superior Court insofar as it was favorable to Continental Grain Company and affirming the decision of the Superior Court, holding that the tax on unloading grain originating outside of the state was not in violation of the Commerce Clause (App. B, infra pp. 24-29).

Thereafter, on July 7, 1965, the Supreme Court of the State of Washington denied a petition for rehearing, and the remittitur was filed (App. B, infra p. 38).

2. How Federal question is presented.

The federal questions sought to be reviewed were first raised in the trial court in the opening statement of counsel of Continental Grain Company (R. 17-18) and were passed upon by the trial judge in his opinion which stated in effect that interstate transportation of the grain ceased at the point of destination, the elevator at Longview, Washington, and that therefore "the State was not in any conflict with the commerce clause of the Federal Constitution in assessing the charges which it did upon the unloading of this grain at destination elevator, Longview." (R. 99-100, App. B, infra p. 37).

The federal question was briefed and argued in the Washington Supreme Court, and the opinion of the Washington Supreme Court states with respect to this question:

> "Upon its cross appeal, plaintiff contends that the tax assessment upon that portion of its gross

income attributable to charges for unloading carriers which deliver grain from out of the state to its terminal was invalid because in violation of the Commerce Clause, U. S. Const. Art. 1, Sec. 8.

We are satisfied that the interstate journey terminated when the carriers delivered the grain to the Longview terminal under bills of lading designating the owners as consignee and the terminal as the destination or port of discharge, and where unloading of the carriers was performed by and under control of the plaintiff. *Convoy Co.* vs. *Taylor*, 53 Wn 2d 539; 334 P2d 772 (1959); *Washington-Oregon Shippers vs. Schumacher*, 59 Wn. 2d 159; 367 P2d (1961). Further the grain had not, at the point of unloading, entered the stream of foreign commerce. Therefore the tax assessed upon the income derived from plaintiff's unloading activities did not contravene the Commerce Clause.

Even assuming that the unloading constituted a part of interstate commerce, the state nevertheless constitutionally could tax the income plaintiff derived therefrom since no discrimination was shown against interstate commerce in favor of competing intrastate commerce in this regard, nor was it shown that the tax assessment would subject interstate commerce to multiple burdens. *Convoy Co. vs. Taylor*, supra; *Washington-Oregon Shippers vs. Schumacher, supra.*" (R. 239-240, App. B, infra pp. 28-29).

3. Facts material to the question presented.

Continental Grain Company is engaged in the operation of a terminal export elevator located on the Columbia River on tidewater at Longview, Washington (R.

225). During the audit period involved in this litigation grain produced in Washington, Oregon, Idaho and Western Montana, was received at this export elevator, such grain arriving by rail, truck and barge. Of 3,579,309 tons of grain received during this period 3,516,588 tons, or 98.2% was forwarded by water carrier in its original form (Ex. 5, R. 121). Of the grain received 2,604,425 tons were received for its own account and 1,003,303 tons were received for Commodity Credit Corporation (Findings of Fact No. 2, R. 225). It is the tax on the receiving charges for the grain received for Commodity Credit Corporation which is the subject of this petition, no taxes being involved on grain received for Continental Grain Company's own account.

The function of the export elevator is to receive shipments coming in by inland transportation in carloads, truckloads or barge lots, coordinate such shipments at the export elevator and load the grain received in ocean going vessels (R. 32). Receiving of grain and the charge therefor which is the subject of this litigation involves the receiving and unloading of grain from cars, vessels and trucks and elevating it into the terminal elevator. (Ex. 9, para. 19 (c) R. 165). Receiving charges with respect to grain of Commodity Credit Corporation are specified in its Uniform Grain Storage Agreement, (Ex. 9, R. 156-170) and a separate charge of 1¾¢ per bushel is a receiving charge for grain received by rail or water and 2¾¢ per bushel for grain received by truck (Ex. 9, R. 168). During the period in litigation, taxes and interest thereon with respect to receiving charges total $20,223.06 (Ex. 7, R. 129). Of all grain received by Con-

tinental Grain Company at its export elevator in which the receiving charges as set out above were collected, it has been stipulated and found as a fact that 55% of such grain was shipped from outside of the State of Washington. (Finding of Fact No. 6, R. 226). The work of unloading the carriers in which grain arrived at the elevator was directed and controlled by Continental Grain Company. (Finding of Fact No. 1, R. 226).

REASONS FOR GRANTING THE WRIT

1. The tax in question is levied for the act or privilege of engaging within the State of Washington in the business of unloading carriers, and the tax is equal to gross income of the business at the rate set forth in the statutes (RCW 82.16.020, App. A, infra, p. 22). In holding that such tax on the gross receipts from unloading carriers which deliver grain from out of the State of Washington is not in violation of the Commerce Clause, the Washington Supreme Court decision is directly contrary to the decisions of this Court in *Joseph* v. *Carter & Weekes Stevedoring Company,* 330 U.S. 422, 91 L. ed. 993, 67 S. Ct. 815, and *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U.S. 90, 82 L. ed. 68, 58 S. Ct. 72. The *Carter & Weekes* case holds that stevedoring, which consists of loading and unloading vessels moving in interstate or foreign commerce, is "essentially a part of the commerce itself and therefore a (New York City) tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce measured by those gross re-

ceipts is invalid" under the Commerce Clause. 330 U.S. 433. The Washington Supreme Court does not mention *Carter & Weekes* or *Puget Sound Stevedoring* in its opinion. *Puget Sound Stevedoring* came to the identical conclusion in 1937 and of course involved the respondent in the present proceedings, the State of Washington. The decision in *Puget Sound Stevedoring* was challenged in *Carter & Weekes*, and after a detailed, careful reconsideration the Court reaffirmed its earlier conclusion. The *Carter & Weekes* decision remains unimpaired to this day.

Continental Grain Company's unloading activities involved not only vessels, but trucks and railroad cars. That the unloading was performed with respect to railroad cars moving in interstate commerce rather than from vessels moving in interstate or foreign commerce does not affect the fact that the unloading is a part of interstate commerce. *Baltimore & O.S.W.R. Co.* v. *Burtch*, 263 U.S. 540, 68 L. ed. 433, 44 S. Ct. 165; *Union Stockyard & T. Company* v. *United States*, 308 U.S. 213, 84 L. ed. 198, 60 S. Ct. 193.

Speaking of stevedoring the Court said in *Carter & Weekes*:

> "Those incidents to transportation occupy the same relation to that commerce whether performed by the crew or by stevedore, contracting independently to handle the cargo. The movement of cargo off and on the ship is substantially a continuation of the transportation." 330 U.S. at 426.

It was pointed out by this Court in *Puget Sound*

Stevedoring and in the *Carter & Weekes* case that transportation by water is impossible without loading and unloading. It is obvious that the transportation by rail or truck is likewise impossible without loading and unloading. The Court in *Puget Sound Stevedoring* stated that it would take judicial notice of the fact that any serious interruption in the service of cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. It must be apparent that any serious interruption in the unloading of railroad cars or trucks would likewise cripple the activities of a port and slow down and obstruct the free and ready flow of commerce. The record in this case points out that a ship would take from 150 to 200 carloads of grain and that if 200 cars were involved, it would take two miles of track to hold the cars (R. 33-35). It requires little imagination to visualize what would happen if there were a serious interruption in the unloading of such cars.

This Court, in 1885, in *Gloucester Ferry Co.* v. *Commonwealth of Pennsylvania,* 114 U.S. 196, 29 L. ed. 158, 5 S. Ct. 826, held that the business of landing and receiving passengers and freight at the ferry wharf was a necessary incident to and indeed was a part of their transportation, the Court observing:

> "Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down in another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is upon the com-

merce between the two States involved in such transportation.' 114 U.S. 203.

This principle was reaffirmed subsequent to *Carter & Weekes* in *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157, 98 L. ed. 583, 74 S. Ct. 396 (1954) where the subject of tax was the "taking" of gas from a gasoline plant into taxpayer's pipeline for interstate transmission. The flow of grain from cars, trucks and barges arriving in interstate commerce at Continental Grain Company's terminal elevator through the conveying devices with which the elevator is equipped into the bins at which grain finally comes to rest is analogous to the flow of gas in the pipelines involved in the *Michigan-Wisconsin Pipeline* case.

The case of *Railway Express Agency, Inc.* v. *Virginia,* 347 U.S. 359, 98 L. ed. 757, 74 S. Ct. 558 (1954), also subsequent to *Carter & Weekes,* explicitly holds that "putting down interstate commodities as an integral part of their interstate movement (is) not adequate grounds for a state license, privilege or occupation tax". 347 U.S. 368.

This Court, in *Carter & Weekes,* recognized that Congress has acquiesced over a long period of time in the holding of *Puget Sound Stevedoring* and stated:

> "As power lies in Congress under the (Commerce) Clause to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicate its agreement with the adjustments of the competing interest of commerce and necessary state revenues." 330 U.S. 428.

In the almost twenty years since the decision in *Carter & Weeks,* while Congress has had occasion to act in other areas of state taxation of interstate commerce, it has continued to acquiesce in the area covered by *Carter & Weekes*. Compare, for example, the prompt action of the Congress in the passage of Public Law 86-272, (15 U.S.C. Sec. 382-384) on September 14, 1959, after the decision of this Court on February 24, 1959, in *Northwestern States Portland Cement Company* v. *Minnesota,* 358 U.S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, 67 ALR2d 1292. Title II of Public Law 86-272 authorized a full and complete study of state taxation of interstate commerce. Pursuant to such authorization, a special subcommittee of the House Judiciary Committee completed in June, 1965, a detailed study which was published in three volumes as House Report 565, 89th Congress, to which report further reference will be made as House Report 565. This report does not give consideration to decisions such as *Carter & Weekes,* the portion of the report dealing with gross receipts taxes being particularly concerned with taxation of interstate sales.

It must be apparent that the State of Washington and the Washington Supreme Court in its decision is engaged in a probing action against the well-established line drawn by this Court in *Carter & Weekes,* endeavoring to find soft spots under which the State of Washington can collect additional revenue to satisfy the state's demand for ever increasing sources of revenue. As noted in House Report 565 at page 1019:

> "Repeated attempts to amend Washington's constitution to authorize an income tax have failed,

> and the gross receipts tax, buttressed by a sales tax, has become an important and established part of the state's tax structure."

Review of the Washington Supreme Court's decision by this Court is imperative to prevent the State of Washington from pushing the enforcement of its gross receipts tax past the boundaries of permissible state taxation of interstate commerce so firmly established by this Court.

This attitude of the State of Washington is evidenced by the fact that in *Tidewater Terminal Co.* v. *State of Washington,* 60 Wn. 2d 155, 372 P.2d 674 (1962) the State Tax Commission agreed that the gross income from activities of the taxpayer in that litigation in unloading interstate carriers was not subject to tax, while in the present case the State Tax Commission is attempting to assert a tax on substantially indistinguishable unloading activities. The Washington Supreme Court commented in 1961 in *Washington-Oregon Shippers Cooperative Assoc., Inc.* v. *Schumacher,* 50 Wn. 2d 159, 367 P.2d 112, 115-116:

> "The more recent pronouncements of the United States Supreme Court have made *Puget Sound Stevedoring* less than a strongly persuasive precedent."

Of course the State of Washington is only one of many taxing jurisdictions which would be involved if this Court failed to grant certiorari in this case. The notation "certiorari denied" following the report of this case would affect all jurisdictions levying gross receipts

taxes similar in nature to that involved in this case. House Report 565 points out at p. 1009 that eight states impose a tax of general applicability on gross receipts of a business: Alaska, Delaware, Hawaii, Louisiana, Mississippi, Washington and West Virginia. The total gross receipts tax collections of these states amounted in 1963 to some 363 million dollars, House Report 565, p. 1030. The report points out that local gross receipts taxes are considerably more prevalent than the state gross receipts taxes and that over 1,000 localities in 18 states have such taxes, House Report 565, p. 1067. Of the 50 largest cities in the country, 12 impose gross receipts taxes. Approximately 370 million dollars of revenue was collected from this source in 1963, House Report 565, p. 1071. Table 35-3 attached hereto as App. C, p. 40, infra, House Report 565, p. 1072 indicates that New York City in 1963 received total gross receipts tax revenues of 234.8 million dollars; Los Angeles—17.7 million dollars; Philadelphia—18.3 million dollars; Seattle—4.2 million dollars; and New Orleans—2.0 million dollars. Table 35-5 at p. 1073 of House Report 565 attached hereto as App. D, p. 40, infra, indicates that not only is this a substantial source of revenue but in the case of New York, an increasing source of revenue, the percentage of revenue from this source to total revenue increasing from 5.3% in 1948 to 12.9% in 1963.

The gross receipts tax of New York City should be of particular interest since this was the tax involved in *Carter & Weekes*. New York City Tax Regulations Art. 131 following *Carter & Weekes* exempts "receipts of stevedoring services from the unloading of ships oper-

ating in interstate and/or foreign commerce" from the measure of the tax. The rate of tax involved in *Carter & Weekes* was 1/10th of 1%, Note 2, 330 U.S. 424, while the present rate of such tax is .4%, Sec. B. 46-2.0 a (2) N.Y.C. Adm. Code.

There is a particular relevance of this Washington Supreme Court decision to activities in Louisiana, a gross receipts tax state, which are substantially the same as the unloading activities of Continental Grain Company in this case. The latest report of the U. S. Department of Commerce on water-borne foreign trade statistics contained in Summary Report FT 985 for January-December, 1963, for release November 4, 1964, contains a table showing shipments of grain on tanker vessels by various U. S. ports of lading—App. E, infra p. 41.

Such table shows that of a total shipping weight from the United States of such cargo of 9,461,723,705 pounds, 5,095,945,528 pounds, or well over half of the total, was shipped from New Orleans, Louisiana, Baton Rouge, Louisiana, and other ports in the New Orleans Customs District. The record in the present case indicates that grain cannot be shipped in export without unloading it from the inland transportation in which it arrives at the elevator into such elevator (R. 34-35). It must be apparent that unloading activities similar to those involved in this case would be of very substantial volume in New Orleans and thus with a large potential of gross receipts tax liability.

This Court, in holding in *Carter & Weekes* that a

tax on the gross receipts from the business of stevedoring in interstate commerce was prohibited by the Commerce Clause, stated:

> "Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause." 330 U.S. 433, 434.

The State of Washington in this case has proven the validity of the Court's reasoning. It can hardly be doubted that other state and local governmental units which employ a gross receipts tax will follow the lead of the State of Washington in attempting to assert a tax on unloading activities in interstate commerce in view of their well known need for additional revenue if this Court does not grant certiorari in this case.

2. The second question in this case requires a review of the Supreme Court of Washington's decision by this

Court to prevent a clearcut and blatant discrimination against interstate commerce. Even the minority opinion in *Carter & Weekes* recognizes that a tax which discriminates against interstate commerce and imposes a burden which intrastate commerce does not bear could not be sustained, pointing out that if the states would be left free to exert such a tax, it would be to the detriment of the national commerce. 330 U.S. 442-443, quoting from *McGoldrick* v. *Berwind-White Coal Mining Company*, 309 U.S. 33, 48, 84 L. ed. 565, 60 S. Ct. 388.

RCW 82.16.050 (App. A, infra p. 22) provides for a deduction in computing the Public Utility Tax, which is the tax assessed against Continental Grain Company in this case, as follows:

> "In computing tax, there may be deducted from the gross income the following items:
>
> (8) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; *and amounts derived from the transportation of commodities to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto, from points of origin in the state, and thereafter forwarded by water*

> *carrier, in their original form, to interstate or foreign destinations*: Provided, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town." (Emphasis added)

As hitherto pointed out, Continental Grain Company's operation at Longview, Washington is "an export elevator . . . on tidewater", infra p. 6; 45% of the grain received by Continental Grain Company is derived from points of origin in the State of Washington, infra p. 8; and 98.2% of the grain delivered to Continental Grain Company's elevator was thereafter forwarded by water carrier in its original form to interstate or foreign destinations, infra, p. 7.

Under the decisions of this Court as previously discussed, and especially *Carter & Weekes,* there is little doubt that amounts derived from unloading such grain at such export elevator are "amounts derived from the transportation of commodities to an export elevator". *Gloucester Ferry Co.* v. *Pennsylvania,* supra. See also *Baltimore & O.S.W.R. Co.* v. *Burtch,* supra and *Union Stockyards & T. Co.* v. *U. S.,* supra.

In summary, the unloading of grain from carriers moving in intrastate commerce to the export elevator of Continental Grain Company literally fills the description contained in RCW 82.16.050 (8).

The reply brief of Continental Grain Company in the Washington Supreme Court pointed out specifically that this statute creates an unqualified discrimina-

tion against interstate commerce, if unloading activities performed with respect to interstate carriers are subject to tax (Supplemental Transcript). The Washington Supreme Court, in its opinion (App. B, infra, p. 29), states:

> "Even assuming that the unloading constituted a part of interstate commerce, the state nevertheless constitutionally could tax the income plaintiff derived therefrom since no discrimination was shown against interstate commerce in favor of competing intrastate commerce in this regard."

A grant of certiorari by this Court is essential, not only to prevent this obvious discrimination against interstate commerce but to reiterate its well established doctrine that a gross receipts tax on interstate commerce where such discrimination exists is invalid.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

October 28, 1965.

Respectfully submitted,

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APPENDIX A

U. S. CONSTITUTION

ARTICLE I—Section 8, Clause 3, Commerce Clause:

"The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

WASHINGTON STATUTES

RCW 82.16.010 Definitions. For the purposes of this chapter, unless otherwise required by the context:

. . . . . .

(11) "Public service business" means any of the businesses defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), (9), and (10) or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, pipe line, public warehouse, toll bridge, toll logging road, water transportation and wharf businesses;

(12) "Gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, dis-

count, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.16.020 Public utility tax imposed. There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

. . . . .

(5) Motor transportation and all public service businesses other than ones mentioned above: One and one-half percent.

RCW 82.16.026 Additional tax imposed. From and after the first day of May, 1953, there is levied and shall be collected from every person for the act or privilege of engaging within this state in one or more of the businesses named in R.C.W. 82.16.020, as a part of the tax imposed by this chapter, an additional tax in the amount of twenty percent of the tax payable under this chapter. To facilitate collection of this additional tax, the tax commission is authorized to adjust the basic rates of persons to which this section applies in such manner as, to reflect the exact amount of the additional tax hereby imposed.

RCW 82.16.050 Deductions in computing tax. In computing tax there may be deducted from the gross income the following items:

(8) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto, from points of origin in the state, and thereafter forwarded by water carrier, in their original form, to interstate or foreign destinations; Provided, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

APPENDIX B

OPINION OF WASHINGTON SUPREME COURT

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONTINENTAL GRAIN COMPANY,
Respondent,

vs.

THE STATE OF WASHINGTON,
Appellant,

No. 37585

EN BANC

Filed

May 6, 1965.

This appeal concerns taxes assessed by the state, defendant (appellant), upon the gross income derived from Longview grain-storage operations of plaintiff (respondent), during the 4 years, 1957 through 1960.

Plaintiff received more than 3½ million tons of grain at its terminal export elevator and warehouse at tidewater during the period in question. Approximately half of that amount was received from points outside the state via rail, truck or barge, and nearly all eventually was exported by ship to foreign destinations. All activities involved in unloading the carriers upon arrival and conveying the grain into the elevator, and in loading the export vessels by grain spout were performed and controlled by the plaintiff.

The bulk of the grain plaintiff received at its export

terminal was its own and does not concern us upon this appeal, as income therefrom was not subject to the tax in dispute. Of the remainder, approximately 97% was owned by Commodity Credit Corporation, a federal agency (hereafter referred to as "C.C.C."), and 3% by other customers of plaintiff (hereafter referred to as "other customers"), all of whom were prior customers who had made advance arrangements for storage. None of the other customers' grain was exported.

It is the tax upon income plaintiff derived from its storage and handling charges for the grain belonging to C.C.C. and other customers, with the exception of income from charges for loading grain out for export, which gave rise to this suit.

This income was taxed at the rate of 1.8% under the Public Utility Tax (RCW 82.16). After petitioning, unsuccessfully, the State Tax Commission for relief, plaintiff sued for an abatement and refund, contending that it should have been taxed, instead, at the rate of 1% under the catchall provision of the Business and Occupation Tax (RCW 82.04.290), and, further, that income it derived from *unloading* of grain from carriers arriving at the Longview terminal from out of state was beyond all tax.

The trial court agreed with plaintiff that the income in question was subject to tax under RCW 82.04.290, rather than RCW 82.16; accordingly, it invalidated the tax assessed, and declared such income subject to tax, instead, under RCW 82.04.290, and thereupon directed refund of any excess paid in. Moreover, the trial

court refused to grant plaintiff's plea to immunize income derived from unloading of the out-of-state carriers.

The state appeals and the plaintiff cross appeals.

The state contends that the Public Utility Tax was applicable, and, therefore, that the trial court erred by invalidating it and declaring the Business and Occupation Tax applicable. The state urges that the plaintiff was engaged in a "public service business," as that term is defined in RCW 82.16.010, which provides:

> For the *purposes of this chapter,* unless otherwise required by the context.
>
> . . . . .
>
> (11) *"Public service business"* means any of the businesses defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), (9), and (10) *or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto,* or any business hereafter declared by the legislature to be of a public service nature. *It includes,* among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, pipe line, *public warehouse,* toll bridge, toll logging road, water transportation and wharf businesses; (Italics ours.)

It is clear from the statute, that for plaintiff's facility to qualify thereunder as a public-service business, one of the following requirements must be met: (1) that it be subject to control by the state, or (2) that it have the powers of eminent domain and the duties incident thereto, or (3) that it be declared by the legislature to be of a public-service nature, or (4) that it be a public warehouse.

The state contends that the plaintiff operated its facility as a public warehouse and thereby came within the definition of public-service business, as defined in RCW 82.16.010 (11), *supra*.

The record shows that the plaintiff annually applied for and received a public-grain-warehouse license for its Longview terminal from the State Department of Agriculture during the years in question, and met all the statutory requirements incidental thereto, which included the filing of evidence of proper insurance, a financial statement, and schedules of charges; furnishing of a warehouse bond, and issuance of warehouse receipts to its customers upon forms prescribed by the Department of agriculture.

Plaintiff used and relied upon its public-grain-warehouse license as a means toward obtaining the grain-storage contract, which it solicited with C.C.C. It issued to C.C.C. negotiable warehouse receipts upon forms required under its license. Under C.C.C. regulations, C.C.C. could not have dealt with any facility but a licensed public-grain-warehouse. Further, plaintiff made its facility available to the other customers, inland dealers or producers, to whom the prescribed negotiable warehouse receipts were also issued by plaintiff.

The plaintiff, having (1) voluntarily obtained a public-warehouse license, (2) performed the statutory requirements incidental to the use of the license, (3) actively used the license and held itself out as a public warehouse for the obtaining of business, and (4) issued negotiable warehouse receipts on forms required under its public-grain-warehouse license, constituted itself as a

public warehouse within the purview of RCW 82.16.010, and was subject to the public-service business tax under RCW chapter 82.16.

The plaintiff cites *Miles* v. *Enumclaw Co-op Creamery Corp.*, 12 Wn. (2d) 377, 121 P.(2d) 945 (1942); *Trudeau* v. *Pacific States Box and Basket Co.*, 20 Wn. (2d) 561, 148 P. (2d) 453 (1944), and other related cases, for the proposition that the plaintiff must have held itself out to the public indifferently to come within the definition of a public warehouse. These cases concern RCW Title 22 which relates to *regulation of public-service businesses*. The definitions under this title are not referred to in the *taxing* statute definition, RCW 82.16.010, *supra*, and, therefore, are not supplemental to the definitions of a public-service business, as defined in R.C.W. 82.16.010. The cases cited are not apposite.

The plaintiff's facility, therefore, comes within the definition, "public service business," in RCW 82.16.-010, and the trial court erred in invalidating the Public Utility Tax assessed and declaring the Business and Occupation Tax applicable.

Upon its cross appeal, plaintiff contends that the tax assessment upon that portion of its gross income attributable to charges for unloading carriers which delivered grain from out of state to its terminal was invalid, because in violation of the commerce clause, U. S. Const. Art. 1 § 8.

We are satisfied that the interstate journey terminated when the carriers delivered the grain to the Longview terminal under bills of lading designating the owner as consignee and the terminal as the destination

or port of discharge, and where unloading of the carriers was performed by and under control of the plaintiff. *Convoy Co.* v. *Taylor,* 53 Wn. (2d) 439, 334 P. (2d) 772, (1959); *Washington-Oregon Shippers* v. *Schumacher,* 59 Wn. (2d) 159, 367 P. (2d) 112 (1961). Further, the grain had not, at the point of unloading, entered the stream of foreign commerce. Therefore, the tax assessed upon the income derived from plaintiff's unloading activities did not contravene the commerce clause.

Even assuming that the unloading constituted a part of interstate commerce, the state, nevertheless, constitutionally could tax the income plaintiff derived therefrom, since no discrimination was shown against interstate commerce in favor of competing intrastate commerce in this regard, nor was it shown that the tax assessment would subject interstate commerce to multiple burdens. *Convoy Co.* v. *Taylor, supra; Washington-Oregon Shippers* v. *Schumacher, supra.*

The trial court was correct in concluding that the income derived from the unloading charges was subject to tax.

The judgment of the trial court is reversed, insofar as it holds the Public Utility Tax inapplicable and where inconsistent with this opinion; otherwise it is affirmed.

HUNTER, J.

We concur:

ROSELLINI, C. J.
HILL, J.
DONWORTH, J.
FINLEY, J.
OTT, J.
BARNETT, J. Pro Tem.
HAMILTON, J.
HALE, J.

OPINION OF SUPERIOR COURT FOR STATE OF WASHINGTON THURSTON COUNTY

COURT'S ORAL DECISION

THE COURT: In the case of Continental Grain Company versus The State of Washington, No. 33857 the facts have been stipulated and they are briefly these. The Plaintiff which will be hereinafter referred to as Continental, owns and operates a grain warehouse at Longview, Washington, which has facilities appropriate for unloading into storage, grain received by rail or barge or truck, and also facilities for removing from such storage, grain to become the cargoes of ships for off-shore transportation. The figures which have been put in the record in tabular form and it is in the stipulation itself or in the exhibits which are attached thereto, show that the vast amount of the bulk of grain passing through that elevator is owned either by Commodity Credit Corporation which will be hereinafter referred to as C.C.C. or by Continental Grain Company the owner of this facility. There is some grain that finds its way into this warehouse which is owned by others, but the record establishes that it is there by reason of an accommodation or by reason of the loaning of the commodity as between parties for their own convenience. Percentagewise it is almost a negligible amount.

The State Tax Commission has assessed a portion of the charges which are collected at this elevator, those being the charges assessed against C.C.C. for receiving grain for storage and other services and for wharfage. No loading out charges have been assessed, or if they have been assessed,

it is as we understand the record, agreed that they will not be collected, that they were not properly assessed and will take their place in the accounting as a deduction.

For purposes of clarification, we ought to state something else. There appears in the record some references to a storage facility at Pasco, Washington, owned and operated by Continental, but it is not to be considered in this case and there is no particular proof upon that matter and the Court understands that he is not to consider it.

There is also in the record certain descriptive testimony concerning what is known as the Long-Bell sheds at Longview, Washington, but there again I understand it to be the intention of counsel that I take no account of that matter, and in fact, there would not be sufficient in the record for me to make a determination on either matter if it was asked for.

So essentially, we come down to this matter: Were the charges which I have described assessed it performed at Longview for C.C.C. properly assessed? Those charges were assessed upon being against Continental by reason of the services which determined by the Tax Commission Continental was a public warehouse and therefore embraced within the provisions of the Public Utility Tax of this State which is RCW 82.16.010.

Continental contends that if any tax is due from it at all, the Public Utility Tax just referred to does not apply and that the proper tax is a portion of the Business and Occupation Tax under the sub-head "Service and Other Activities" which is RCW 82.04.290.

So at the very threshold of the case we have to determine whether or not this is public service business and the warehouse involved is a public warehouse, or whether it is otherwise?

Now, the particular facts that apply to that situation, and there may be other facts in the record, but these come to mind at present. That except for the relative insignificant bulk of grain which is handled for others, all other grain that is handled in this warehouse is either the property of C.C.C. or of Continental and with respect to C.C.C. the significant facts are these: It does business in this State and I believe I am correct in saying almost uniformly in this territory, I believe the record supports that, under what is denominated Uniform Grain Storage Agreement which is Exhibit 9 attached to the stipulation in this case, said stipulation being designated Exhibit A.

Now, this Uniform Storage Agreement is quite lengthy, but I am just going to enumerate some of its features: If it enters into this agreement with any particular warehouse, facilities, plans and equipment of that warehouse must conform with the C.C.C.'s requirements for properly handling and safe storage; the warehouseman must exercise personal control of the facilities and his employees and personnel must be skilled and experienced in the warehouse business; where State or local laws require the licensing of the facility, then that license must be procured and must be displayed in the warehouse, and then there is a requirement that there must be adequate safety provisions in respect to fire, flood and other hazards, and fire fighting equipment, maintenance of adequate records; fi-

nancial responsibility of the warehouseman must be assured; a surety bond must be kept, and there must be an examination by the representatives of C.C.C. — and I interject here another matter which appears in the proof, but not in this agreement Exhibit 9 — with respect to the warehouse at Longview it is testified that there has been no inspection by the State whatsoever and there has been on the other hand definite testimony that the C.C.C. has frequently inspected the warehouse and its contents and particularly for the performance of the requirements and others that I have mentioned.

The law is well established that whether a concern is a public service concern or otherwise depends upon what it does and not what anybody says about it, or what writings which may have been issued. It is always and ever the problem to inquire into what it actually does and that fact having been determined, that determines whether or not it is a public service concern or otherwise; and conversely, the law is just as plain, that the status of a public concern, public service concern, cannot be imposed upon a concern if it does not hold itself out to serve the public indifferently.

Now, there is a wealth of authority in this State on this and in other States, but the leading case in this State so far as I know is the case of *Cushing versus White,* 101 Wash. 172, and that was a decision written in the Supreme Court by the late Stanley Webster whose learning will intrigue anyone who reads the decisions for which he is responsible. In that case Judge Webster reviewed a great number of cases in this and other jurisdictions and laid down the law as I hope I have correctly

stated it: That primarily the status of public service must be established from what the concern under examination actually does.

Now, of the many cases that followed *Cushing versus White,* I select one which I believe meets the situation in which we have in the case at bar, found at 117 Wash. 453, and that is *State Ex. Rel. Silver Lake Railway and Lumber Company versus Public Service Commission.* In that case there was attempted to be imposed upon this railway company a common carrier status. It was contended that it had always been a private carrier, had never held itself out to the public and hence was a private carrier. These are some of the things that this concern did. In 1908 it filed a petition in court to condemn certain lands for its use, but it never carried that matter to completion so the Court just notes it and passes it.

Then I quote this from the decision at Page 455: "The service heretofore rendered by the relater to other persons consisted chiefly of transportation of merchandise needed by a store operated near Silver Lake, the customers of which were principally employees of the railroad. For a short time it transported shingles for one of its stockholders, and at other times has carried isolated shipments of machinery, and in one month transported a large amount of gravel for the county commissioners for the purpose of repairing a highway. It has never transported logs for other persons."

And they held that notwithstanding these claims that it had done nothing other than private service, that it was still a private carrier, and the attempt to declare it a public carrier failed.

The facts in this case compel a holding that the elevator at Longview was not a public service and more particularly could not properly be taxed under the Public Utility Provisions of the Excise Tax which I have previously referred to.

Now, we come to the constitutional arguments which are made and they would be described in this way. It is part of the stipulation that some of this grain which is unloaded at Longview has points of origin outside the State of Washington and to that extent it is interstate commerce. It is also contended that the whole transportation from the time the grain originates on domestic carriers whether rail or barge or truck is a continuous movement in export and that the taxes run afoul of the Federal Constitution in what we may call the export-import clause, Article I, Section 10, prohibits State charges.

The facts will not support a position that this is a continuous movement in export, and for a number of reasons:

In the first place, grain, and particularly this grain is fungible and goes into the elevator where its identity is lost. There is a mingling with grain originating in various points and when it is eventually ordered out, the testimony is that it goes out in this fashion. That some species of direction either oral or written is given to the proper person in charge of such matters at the Longview elevator and this direction substantially contains but three things: The quantity to be segregated, loaded out and shipped; the type, that is, whether it be wheat, barley, or what have you, those two are mentioned in the record; and thirdly, the grade. Nobody can say where this grain came from except that it is

part of the bulk that is in the elevator at Longview. Some of it, again this is apparently minor from what is said in the record, will never leave the elevator for export, but I think the record does sustain the statement that the vast majority of it does move in export. But when it moves is determined upon the arrival of the ship, and the quantities are determined by the one ordering the grain out, and the destination, of course, is determined by the one ordering it out.

It has no destination in an export sense when it goes into the elevator, simply grain of a vast amount which may be eventually shipped overseas to then unknown destinations. Now, this grain comes in on a bill of lading which designates the Longview elevator as the point of destination. It is true as stated in the record that a through bill of lading in this particular movement from point of origin to destination overseas is unknown in the business which is far from supporting the idea that it is in line of exports, seems to negative the thought that it is destined for any particular destination which can be determined by the facts here.

So the fact must be found that the grain is not in the stream of export in the sense that the Federal Constitutional provision would apply.

Now, what about the interstate character because it is admitted that some of this grain has a point of origin outside the State of Washington. Well, there again it must be remembered that the bills of lading are from either a point within the State of Washington as a point of origin, or point outside the State of Washington as a point of origin, but the point of destination is always the elevator

at Longview and at that point interstate transportation and intrastate transportation have ceased.

The cases are very clear on that. We have abundant authority in our own State and I believe authority in the Supreme Court of the United States. We are therefore not in any conflict, the State was not in any conflict with the commerce clause of the Federal Constitution in assessing the charges which it did upon the unloading of this grain at destination elevator, Longview.

In spite of the efforts to distinguish them, I believe that *Convoy Company versus Taylor,* 53 Washington (2d) 439 and *Tidewater Terminal Company versus State,* 60 Washington 155 directly in point and determinative of the propriety and validity of the charges for receiving this incoming grain at the elevator at Longview.

Now, what charges are properly assessed, if any, against this grain and services that are performed with respect to it at the Longview terminal? Will those charges properly be assessed under the service and other activities classification of the Business and Occupation Tax which is RCW 82.04.290?

I took a very careful look this morning at the appeal provisions which govern a proceeding of this sort because, although not argued to me I wish to be assured of what form my determination could properly take. I can probably illustrate so that you will get my point. With respect to straight reviews; for example, a review of an order of the Public Service Commission of this State, the Court on appeal does not issue the order that it thought should have been issued, it remands the matter to the regulatory body for the entry of a proper order in accordance

with its ruling, but this proceeding at bar under the statutes which are applicable partakes of the nature of a trial de novo because we have admitted and considered testimony quite apart from what was before the administrative body. In reading the appeal provisions I conceive it proper to determine, as I have done, that the classification under service and other activities is the proper one and that the tax should be assessed under that section.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CONTINENTAL GRAIN COMPANY, *Respondent,*	REMITTITUR No. 37585
v.	Thurston
THE STATE OF WASHINGTON, *Appellant.*	County No. 33857

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 6, 1965, became the final judgment of this court in the above entitled case on July 7, 1965. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Four Hundred Fifty-nine and 63/100 ($459.63) Dollars in favor of the State of Washington and against Continental Grain Company and against its surety, United Pacific Insurance Company, to the limit of the surety bond.

The Petition for Rehearing was Denied by an Order dated July 7, 1965.

cc. Court Reporter

HON. JOHN J. O'CONNELL
MR. JAMES A. FURBER
MR. HENRY W. WAGER

GORDON, SAGER, HONEYWELL, MALANCA, HAGER & PETERSON
MR. W. ROGER JOHNSON

GOLDSMITH, SIEGEL & GOLDSMITH
MR. ARTHUR A. GOLDSMITH
MR. GERSON P. GOLDSMITH

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 7th day of July, A.D. 1965.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington.

APPENDIX C

TABLE 35-3.—GROSS RECEIPTS TAX REVENUE COMPARED TO TOTAL TAX REVENUE IN THE FIFTEEN LARGEST GROSS RECEIPTS TAX CITIES, 1963

	Population rank, 1960	Total gross receipts tax revenue (in millions of dollars)	Total tax revenue (in millions of dollars)	Total gross receipts tax revenue as percentage of total tax revenue
New York	1	234.8	1,824.1	12.9%
Los Angeles	3	17.7	181.7	9.7%
Philadelphia [1]	4	18.3	205.9	8.9%
St. Louis	10	4.9	72.2	6.8%
New Orleans	15	2.0	34.2	5.8%
Pittsburgh	16	2.6	46.3	5.6%
Seattle	19	4.2	29.7	14.1%
Kansas City, Mo.	27	2.9	29.6	9.8%
Portland, Oreg.[1]	32	1.1	22.0	5.0%
Birmingham [1]	36	3.0	11.5	26.1%
Norfolk	41	3.1	26.4	11.7%
Tampa	48	1.3	15.9	8.2%
Richmond	52	3.4	30.4	11.2%
Charlotte	59	0.5	11.2	4.5%
Albuquerque	60	0.4	12.6	3.2%

[1] Tax includes alternate non-gross-receipts base of general applicability.

Sources: (1) U.S. Bureau of the Census, Dept. of Commerce, Compendium of City Government Finances in 1963, table 5 (1964); (2) figures supplied by the Bureau of the Census from municipal financial reports.

APPENDIX D

TABLE 35-5.—RELATIVE IMPORTANCE OF LOCAL GROSS RECEIPTS TAX REVENUE FOR SELECTED YEARS

Gross receipts tax revenue as a percentage of total tax revenue in the fifteen largest gross receipts tax cities, 1948–1963

	Population rank, 1960	1948	1953	1958	1963
New York	1	5.3%	7.5%	8.3%	12.9%
Los Angeles	3	8.9%	9.2%	7.3%	9.7%
Philadelphia [1]	4	N.A.	9.8%	9.5%	8.9%
St. Louis	10	5.1%	6.7%	7.0%	6.8%
New Orleans	15	2.2%	4.2%	6.4%	5.8%
Pittsburgh	16	6.9%	10.1%	8.3%	5.6%
Seattle	19	8.2%	26.7%	18.2%	14.1%
Kansas City, Mo.	27	5.7%	8.9%	9.8%	9.8%
Portland, Oreg.[1]	32	0.4%	7.2%	5.1%	5.0%
Birmingham [1]	36	14.8%	26.2%	26.3%	26.1%
Norfolk	41	21.1%	17.9%	11.4%	11.7%
Tampa	48	13.9%	11.8%	9.4%	8.2%
Richmond	52	N.A.	12.5%	11.4%	11.2%
Charlotte	59	N.A.	N.A.	N.A.	4.5%
Albuquerque	60	N.A.	N.A.	N.A.	3.2%

N.A.: Not available or not applicable.

[1] Tax includes alternate non-gross-receipts base of general applicability.

Sources: (1) U.S. Bureau of the Census, Dept. of Commerce, Compendium of City Government Finances, table 5 (annual series); (2) figures supplied by the Bureau of the Census from municipal financial reports.

APPENDIX E

ANNOUNCEMENTS AND SPECIAL NOTICES

SHIPMENTS OF GRAINS ON TANKER VESSELS

In compiling the United States waterborne foreign trade statistics, merchandise imported or exported on dry cargo (liner and irregular service) vessels and tanker vessels is shown separately. This distinction between dry cargo and tanker shipments is based solely on the type of vessel used without regard to the cargo carried.

Although tanker vessels are those primarily designed for the carriage of liquid cargo in bulk, an examination of the United States waterborne foreign trade statistics revealed that a number of tanker vessels are departing from the United States with shipments of grain, which is usually carried on dry cargo vessels. Information on the amount of grain exported on tanker vessels during 1963 by port of lading is shown in the following table:

DOLLAR VALUE AND SHIPPING WEIGHT OF GRAINS EXPORTED
ON TANKER VESSELS BY UNITED STATES PORT OF LADING

JANUARY-DECEMBER 1963

U.S. Port of Lading	Value (dollars)	Shipping weight (pounds)
Total	269,331,325	9,461,723,705
Boston, Mass	1,097,839	36,674,920
Philadelphia, Pa	2,762,500	106,275,020
Baltimore, Md	4,139,815	156,625,600
Norfolk, Va	6,832,422	239,643,600
Charleston, S.C	915,000	27,278,400
Mobile, Ala	1,751,646	75,723,950
Pascagoula, Miss	13,687,351	523,512,870
New Orleans, La	59,924,009	2,113,485,925
Baton Rouge, La	35,735,843	1,177,368,990
Other ports in New Orleans Customs District	52,985,498	1,805,090,613
Port Arthur, Tex	11,776,845	419,773,200
Galveston, Tex	12,922,130	406,694,050
Houston, Tex	18,863,717	653,329,680
Corpus Christi, Tex	5,285,745	241,393,010
Long Beach, Calif	1,540	37,588
Portland, Oreg	6,074,456	225,817,472
Longview, Wash	4,961,553	183,165,766
Vancouver, Wash	8,367,833	304,897,600
Other ports in Oregon Customs District	3,433,488	124,510,040
Seattle, Wash	2,667,467	96,468,550
Tacoma, Wash	5,812,162	212,720,180
Duluth, Minn	2,139,069	75,018,420
Superior, Wis	5,299,226	184,915,041
Milwaukee, Wis	493,290	23,798,780
Chicago, Ill	1,020,017	36,752,440
Toledo, Ohio	380,864	10,752,000

Monthly totals and port of lading by country of destination detail will be made available upon request to the Foreign Trade Division, Bureau of the Census, Washington, D.C. 20233.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1965

No. 710

CONTINENTAL GRAIN COMPANY, *Petitioner,*

v.

THE STATE OF WASHINGTON, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE PRINTING PLANT, OLYMPIA, WASH.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1965

No. 710

CONTINENTAL GRAIN COMPANY, *Petitioner*,

v.

THE STATE OF WASHINGTON, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 24, Supreme Court Rules, the respondent submits the following Brief in Opposition to the petitioner's Petition for a Writ of Certiorari.

I

COUNTERSTATEMENT OF THE CASE

The petitioner's statement of the facts material to the question presented distorts the true nature of its activities and mistakenly identifies the incidence of tax. For these reasons we submit the following counterstatement:

The petitioner is engaged in the business of operating licensed public warehouses at Longview,

Washington. At these warehouses it receives and stores grain that, for the most part, will ultimately be disposed of by shipment overseas. For its services in receiving and storing grain the petitioner charges the owner of the grain certain fees. These fees are based on contracts or tariffs filed with and approved by the State of Washington.

The grain which is received at the petitioner's licensed public warehouses at Longview is produced in Washington, Oregon, Idaho and Western Montana. This grain is transported to the petitioner's warehouses by common carrier (either by truck, railroad or barge) on bills of lading consigned for the most part to the owner of the grain, which ladings indicate Longview, Washington, as point of destination or port of discharge. The responsibility of unloading this grain is that of the petitioner and not the carrier of the grain. The petitioner does not own or lease any of the means of transporting this grain to and from its licensed public warehouses at Longview. Inspectors employed by the Department of Agriculture of the State of Washington inspect and grade all grain received at or shipped from the petitioner's warehouse facilities at Longview. After a period of storage the grain is either sold to the petitioner while in storage at Longview or loaded onto vessels for shipment overseas.

The tax in question was assessed under RCW 82.16.020 which imposes a tax on " * * * every person * * * engaging within this state in any

one or more of the businesses herein mentioned. * * *" One of the businesses herein mentioned is that of a public warehouseman, RCW 82.16.010(11). For the full text of this subsection and RCW 82.16-.020, see Appendix A of the petitioner's petition.

The tax in question is imposed on the business of operating a public warehouse and is measured by the receipts from that business. A necessary incident to the business of operating a public warehouse is the unloading of commodities from carriers. The tax is not imposed, however, on the receipts themselves from such unloading, as the petitioner erroneously suggests.

II

ARGUMENT

Reasons for Denying the Writ.

1. The first reason assigned by the petitioner for granting the writ is that the decision of the Washington Supreme Court is not in accord with the decisions of this court, to-wit, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937).

The validity of these two cases and the proposition for which they stand we do not dispute. They stand for the proposition that:

> "* * * Stevedoring * * * is essentially a part of the commerce itself and there-

> fore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. * * *"

These two cases, however, do not stand for the proposition that a public warehouseman who, incident to its storage activities, unloads grain from a common carrier whose responsibility for the transportation of the grain has terminated, is entitled to deduct amounts charged for unloading.

These two cases are limited to stevedoring activities that, because of historical custom and usage, are considered an integral part of interstate or foreign commerce itself. They are not authority for the proposition that the activity of unloading grain from railroad cars or other carriers originating from without the state under employment by the owner of the grain enjoys the same status as the activity of unloading cargo from vessels engaged in interstate or foreign commerce under employment of the carrier. To our knowledge (and the record is silent on this point) it never has been the duty of train or inland transportation crews to unload the freight from loaded cars engaged in interstate transportation when they arrive at the point of destination. The stipulated facts show that it was the duty of the owner of the grain to arrange for its unloading.

2. The writ should be denied for the reason that the question presented has already been determined by this Court. The cases of *Canton R. Co. v. Rogan*, 340 U.S. 511 (1951), and *Western Maryland R. Co.*

v. Rogan, 340 U.S. 520 (1951), make it clear that the handling of exports and imports within a port, except as to stevedoring, and the transportation of exports and imports to and from a port are subject to nondiscriminatory state gross receipts taxes. The line drawn in these cases is the water's edge, *viz.*, the loading on and off of the ship itself.[1]

3. The writ should be denied for the reason that even if we were to assume, *arguendo*, that the unloading of grain from carriers originating from without the State of Washington is a continuation of the transportation process, this unloading activity is still properly subject to a gross receipts tax. As pointed out, *infra*, the tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character nor can any other state repeat the tax, since the subject of taxation is exclusively local in nature. For these reasons, the commerce clause does not invalidate the tax. *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662 (1949).

4. The second reason assigned by the petitioner for granting a writ is based upon an erroneous reading of the statute. The petitioner contends that RCW 82.16.050(8), which allows a deduction for amounts derived from the transportation of commodities to an export elevator from points of origin within Washington and thereafter forwarded by water car-

[1]It should be noted that the respondent allowed the petitioner a deduction for amounts it derived for loading grain from its terminal storage warehouses to ships.

rier in their original form in interstate or foreign destinations, discriminates against interstate commerce. Presumably, the alleged discrimination is that the statute does not allow a comparable deduction on amounts derived from the transportation of commodities originating from points within the state. This is erroneous. RCW 82.16.050(6)[2] allows a deduction on amounts derived from businesses which the state is prohibited from taxing under the constitution of this state or the constitution or laws of the United States. This Court has made it abundantly clear that an unapportioned gross receipts tax on the privilege of carrying on an exclusively interstate transportation business is immune from state tax under the commerce clause. *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

There is, however, a more basic fallacy to the petitioner's contention. The statutory deduction to which it refers applies only to amounts derived for the *transportation* of commodities. It does not apply on amounts derived from *unloading* of commodities after the transportation has ceased. Under the aforementioned statutory provisions, amounts derived from the transportation of commodities to export facilities are deductible whether the transportation originates from within or without the state.

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[2]"Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;"

III

CONCLUSION

For the reason that the decision of the Supreme Court of the State of Washington is in accord with the relevant decisions of this Court, we respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

The business upon which the questioned tax was laid was the unloading of commodities from interstate carriers by petitioner, Continental Grain Company. Receipts from this business were segregated and identified as shown in petitioner's brief pp. 7 and 8. That such business was a necessary incident to the business of operating a public warehouse or any other business is quite irrelevant.

This Court in *Puget Sound Stevedoring Company* v. *State Tax Commission,* 302 U.S. 90 (1937) held that the Washington gross receipts tax could be levied on some

portions of a business activity without constitutional objection while violating the Commerce Clause if levied on that portion of a business consisting of loading and unloading carriers in interstate and foreign commerce.

REPLY TO RESPONDENT'S ARGUMENT

Respondent, while recognizing the validity of *Joseph* v. *Carter and Weekes Stevedoring Co.,* 330 U.S. 422 (1947) and *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U.S. 90 (1937) attempts without any citation of authorities to limit the holding of these cases to situations where those engaged in unloading are employed by the carrier (Resp. Br. p. 8). *Carter & Weekes* certainly does not make any distinction of this nature. *Puget Sound Stevedoring Co.* notes at 302 U.S. 93 that

> "Sometimes the cost (of the unloading) is absorbed by the vessel and sometimes billed as an extra charge to shipper or consignee",

and at 302 U.S. 94

> "The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the state. What is decisive is the nature of the act, not the person of the actor".

The State of Washington could not be too impressed with this pretended distinction since as noted in the footnote at p. 9 Respondent's Brief it allowed Continental Grain Company a deduction for amounts derived from loading grain from terminal warehouses to ships, and of course Continental Grain Company was not employed by the ship.

Carter & Weekes and *Puget Sound Stevedoring Co.* so squarely cover the facts in this petition that if the Washington Supreme Court decision in this case is allowed to stand unquestioned, the numerous state and local jurisdictions levying gross receipts taxes could come to no other conclusion than that the long line of authority culminating in these two cases is no longer good law. Neither would there be any explanation of what this Court deems the present law to be.

The State of Washington argues that the cases of *Canton R. Co.* v. *Rogan*, 340 U.S. 511 (1951) and *Western Maryland R. Co.* v. *Rogan*, 340 U.S. 520 (1951) have determined the question presented to this Court. The Court is very clear in *Canton Railway Co.* that unloading and loading charges are not involved in its decision.

> "Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence, we need not decide whether loading for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. *Joseph* v. *Carter & Weekes Stevedoring Co.* (citation)." 340 U.S. 515.

In *Western Maryland R. Co.* the Court concluded its opinion:

> "Whether loading and unloading would be exempt is a question we reserve" 340 U.S. 522.

Respondent's brief at page 9 states that unloading of grain from interstate carriers is properly subject to the

gross receipts tax, since "the tax does not discriminate against interstate commerce nor can any other state repeat the tax since the subject of taxation is exclusively local in nature," citing *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U.S. 662 (1949).[1]

Carter & Weekes, the validity of which respondent purports to recognize, states otherwise:

> "Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, these laws may be unconstitutional because they burden or interfere with commerce." 330 U.S. 433.

In *Carter & Weekes,* in a situation similar to that of petitioner, the Court also found that there was in fact a multiple burden on interstate transportation when the gross receipts from stevedoring were subject to tax because of the possibility of a similar tax at the other end of the line.

In *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), this Court distinguished *Carter & Weekes* as a case where a possibility of a multiple burden existed, stating:

> "A tax on an integral part of an interstate movement might be imposed by other states with the net effect of prejudicing or unduly burdening commerce" 366 U.S. 202.

Five years after *Interstate Pipe Line,* this Court eliminated the "multiple burden" test as the critical factor in determining validity of a tax, when in *Michigan Wis-*

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[1] Decided by a 5-4 Court, one member of the majority concurring on the ground that the tax was on intrastate commerce.

consin Pipeline Company v. *Calvert*, 347 U.S. 157 (1954) in a unanimous opinion, it held that it would be sufficient to render a tax unconstitutional if it were on an incident of transportation "not so separate and distinct from interstate transportation as to support the tax", finding as an *additional* objection that a multiple burden would result.

Respondent states that there is no discrimination against interstate commerce in this case.

R.C.W. 82.16.050 (8) (App. A Petitioner's Brief) grants a deduction in computing the gross receipts tax for "amounts derived from transportation of commodities to an export elevator . . . from points of origin in the State . . ." Although respondent (Br. p. 10) without citing any authority asserts that transportation does not include unloading, this Court has stated otherwise on many occasions:

> "The transportation in commerce, at the least begins with loading and ends with unloading," *Carter & Weekes*, 330 U.S. 427, 428 and other cases cited in petitioner's brief, p. 18.

Since the Washington Supreme Court in this case disallowed the deduction with respect to unloading grain received from outside the state and R.C.W. 82.16.050 (8), to be consistent with the decisions of this Court, must allow a deduction with respect to unloading grain received from within the state, there is an obvious discrimination against interstate commerce.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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